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In The

Supreme Court of the United States

October Term 1955

No. 466

George H. Brasier, PETITIONER,

V.

United States of America; H. V. Higley, Administrator of Veterans Affairs, Veterans Administration, Washington, D.C., Ted Martens Chief of Vocational Rehabilitation, Lincoln, Nebraska; Freeman B. Decker, Superintendent of Public Instruction, Lincoln, Nebraska, Wayne O. Reed, former Superintendent of Public Instruction, Lincoln, Nebraska and Otto G. Ruff, former Supervisor of Veterans Education, Lincoln, Nebraska, RESPONDENTS.

RESPONSE TO AND BRIEF IN SUPPORT THEREOF TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief of Respondents Freeman B. Decker, Superintendent of Public Instruction; Wayne O. Reed, Former Superintendent of Public Instruction and Otto G. Ruff, Former Superintendent of Veterans Education.

CLARENCE S. BECK, Attorney General
of the State of Nebraska,
ROBERT V. HOAGLAND, Assistant Attorney
General of the State of Nebraska,
Attorneys for Respondents.

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STATEMENT OF THE CASE

There is an action at law by the plaintiff George H. Brasier, the appellant, as owner of the Lincoln Barber

College instituted against the United States of America and certain other Federal defendants connected with Veterans Administration, and the appellees herein who were officers and representatives of the State of Nebraska in the Department of Education.

The gist of the plaintiff's cause of action as is shown by his complaint (Record page 1) and amended and supplemental complaint (Record page 55) and exhibits thereto attached, is that he entered into a contract with the defendants Exhibit A (Record page 6) and Exhibit B (Record page 14) whereby during a period from July 1, 1949 to June 30, 1950, he was to furnish training to eligible veterans for a consideration to be paid to him by the United States of America.

The plaintiff further alleged that the State defendants, these respondents, gave notice of approval of the Lincoln Barber College for offering of a course in barbering to eligible veterans under the Servicemen's Readjustment Act of 1944, as amended.

The plaintiff further alleged the enactment of Public Law 266, 81st Congress. This act set up more stringent requirements for the approval of veterans training courses and pursuant to said law both the federal defendants and state defendants withdrew their approval of the plaintiff's Barber College for veterans training.

The plaintiff further alleged that as a result of the withdrawal of this approval he was damaged in the sum of $10,000 by the federal defendants and in an additional sum of $25,440.00 by the state defendants.

The federal defendants filed a motion to dismiss the complaint upon the grounds that under the provisions

of Title 38, U.S.C.A. Section 11-A-2, Title 38, U.S.C.A. Section 705, Title 28, U.S.C.A. Section 1346(a)(2) and Title 28, U.S.C.A. Section 1346(b) that the court was without jurisdiction to entertain the suit and also upon the ground that under the provisions of Title 28, U.S. C.A. Section 1391(b) venue did not lie in the District of Nebraska (Record page 59).

The state defendants filed a joint motion to dismiss the action upon the grounds that the court had no jurisdiction over the alleged cause of action against the federal defendants and consequently had no jurisdiction to entertain said cause of action against the state defendants, and also upon the ground that the complaint failed to state a claim upon which relief can be granted.

Upon this condition of the pleadings, the court on August 24, 1954, sustained the motion to dismiss of both the federal and state defendants (Record page 41) and it again reaffirmed its position by an order dismissing the amended and supplemental complaint on November 19, 1954 (Record page 63).

This action of the Federal District Court was appealed by the petitioner to the United States Circuit Court of Appeals for the Eighth Circuit, being designated as No. 15,283 therein. This case was duly argued to the Circuit Court. On June 21, 1955, the Circuit Court sustained the opinion of the Honorable John W. Delehant, District Judge. A copy of this opinion is found on page 17 of the petitioner and appellant's petition for writ of certiorari filed herein.

POINT TO BE ARGUED.

The court had no jurisdiction over this action and inasmuch as this jurisdiction is essential it must be concluded that no claim upon which relief could be granted is stated against the state defendants.

Public Law 266, 81st Congress, 63 Statutes at Large 653.

Title 38 U.S.C.A. Section 11a-z.

Title 38 U.S.C.A. Section 705.

Fletcher v. *Veterans Administration* (D.C. Mich.), 103 F. Supp. 654.

New York Technical Institute of Maryland v. *Limberg* (D.C. Md.), 87 F. Supp. 308.

ARGUMENT.

The Court Had No Jurisdiction over this Action and Inasmuch as this Jurisdiction Is Essential It Must Be Concluded that No Claim Upon Which Relief Could Be Granted Is Stated Against the State Defendants.

As is shown by the Record the plaintiff is relying upon a purported contract for the schooling of veterans under the Servicemen's Readjustment Act of 1949 as amended. The contract contained among others the following provisions:

> "It is understood and agreed that the terms of this contract are subject to and will be governed by, Veterans Administration regulations issued pursuant to Public Laws 16 and 346, as amended, and that *any obligation assumed by the Veterans Administration under this contract is limited to the appropriated funds made available therefor.*" (Emphasis Supplied)

The contract seems, therefore, to have contemplated such limitations as might thereafter be introduced into pertinent appropriation Acts and were actually embodied in Public Law 266.

Congress, on August 24, 1949, passed as part of its appropriation for the Servicemen's Readjustment Act, Public Law 266, 63 Statutes at Large 653. The pertinent portions of this act provide:

> "* * * No part of this appropriation for education and training under Title II of the Servicemen's Readjustment Act, as amended, shall be expended subsequent to the effective date of this act for subsistence allowance or for tuition, fees or other charges in any of the following situations:
>
> "(1) For any veteran for a course in an institution which has been in operation for a period of less than one year immediately prior to the date of enrollment in such course unless such enrollment was prior to the date of this Act."

Title 38 U.S.C.A. Section 11a-z is in the following language:

> "Notwithstanding any other provisions of law, except as provided in Sections 445 and 817 of this title, the decisions of the Administrator of Veterans Affairs on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions."

Title 38 U.S.C.A. Section 705, provides:

> "All decisions rendered by the Administrator of Veterans Affairs under the provisions of Sections

701, 702, 703, 704, 705, 706, 707-710, 712-715, 717, 718, 710 and 721 *of this title or the regulations issued pursuant thereto, shall be final and conclusive upon all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.*" (Emphasis Supplied)

In construing the above statutes in connection with essentially undistinguishable circumstances the various Federal courts have said:

Fletcher v. *Veterans Administration* (D.C. Mich.), 103 F. Supp. 654.

"Congress has vested in the Veterans Administration the exclusive right to determine what disabled veterans are eligible for training, and in what institution, and also the right to withdraw such students. The exercise of this right is not reviewable by a court of the United States as evidenced by Section 5 of Public Law 2, 73rd Congress, March 20, 1933, 38 U.S.C.A., Section 705 which provides as follows: 'All decisions rendered by the Administrator of Veterans' Affairs under the provisions of Sections 701-703, 704, 705, 706, 707-715, 716-721 of this title and Sections 30a, 485 of Title 5 or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.' This statute was incorporated in the Servicemen's Readjustment Act of 1944, Public Law 346, by Section 1500 thereof, 38 U.S.C.A., Section 697. It is applicable to Public Law 16 students because Section 400(a) of Public Law 346 is an amendment to Paragraph VII of Veterans' Regulation No. 1 (a) relating to Public Law trainees. Section 11 of Public Law 866, 76th Congress, 38 U.S.C.A. Section 11a-2, is

also for application in its denial of the right of judicial review of the Administrator's decisions as to questions of both fact and law. New York Technical Institute of Maryland Inc. v. Limburg, D.C., 87 F. Supp. 308.

"To determine the questions of law and fact raised by the claims set forth in Count I of plaintiff's bill of complaint would require this court to invade the exclusive province of the Veterans Administration, and since there is an express statutory prohibition regarding such action on the part of the courts, this court is without jurisdiction to entertain such an action. The motion for summary judgment is hereby granted.

"The ultimate purpose of the claims set forth in Count I is to obtain moneys from the public treasury and this, in effect, constitutes an unauthorized suit against the United States, since the United States cannot be sued without its consent, and for this reason also, this count must be dismissed. New York Technical Institute of Maryland, Inc., v. Limburg, D.C., 87 F. Supp. 308, 313."

New York Technical Institute of Maryland v. *Limberg* (D.C. Md.), 87 F. Supp. 308:

"It is also my view that the provision for educational and vocational training to veterans is in the nature of a gratuity, as are pensions, that may be granted or withheld in the wisdom of Congress. See Barnett v. Hines, 70 App. D.C., 217, 105 F. (2d) 96, certiorari denied 308 U.S. 573, 60 S. Ct. 88, 84 L. Ed. 480; Slocumb v. Gray, D.C., 82 F. Supp. 125; Metropolitan Training Center v. Gray D.C. D.C., Memo. opinion October 14, 1949, Judge McGuire. Such gratuities are, of course, quite different from veterans' contractual rights under war risk insurance policies. Lynch v. United States, 292 U.S. 571, 577, 54 S. Ct. 840, 78 L. Ed. 1434. If, as I think is clearly the case, Section

705 does apply to the educational rights in Section 701(f) the present suit in which plaintiff seeks to review the administrative decision cannot be maintained. Van Horne v. Hines, 74 App. D.C. 214, 122 F. (2d) 207, certiorari denied 314 U.S. 689, 62 S. Ct. 360, 86 L. Ed. 552; Snauffer v. Stimson, 81 U.S. App. D.C. 110, 155 F. (2d) 861; International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. Bradley, D.C. 75 F. Supp. 395. In seeking to establish the right to judicial review the plaintiff here relies largely on Stark v. Wickard, 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733. But that case is not pertinent here because in the Act there involved Congress was silent as to judicial review, which is not the situation here.

"Plaintiff's counsel apparently argue that the plaintiff obtained some vested rights under the Servicemen's Act. But this is a misconception. The plaintiff in this case has no greater rights than the veteran himself would have. The benefits are granted by the statute to the veterans and not created for the benefit of the school. There is no obligation upon the Administrator to enter into contracts with schools for unreasonably high rates of tuition, which he does not approve."

In view of the facts set forth in the plaintiff's petition and the statutes above set forth and the Federal authorities interpreting these statutes under similar factual situations as herein presented, we believe that the plaintiff has no vested rights under the Servicemen's Readjustment Act of 1944 as amended. He knew of the limitations which were provided in his alleged contract.

These respondents have just been furnished a copy of the brief of the respondents, the United States, H.

V. Higley, and Ted Martens, and herewith adopts as much thereof as may be applicable to the position of these respondents.

CONCLUSION.

Congress having made the provisions it did in Title 38 U.S.C.A. Section 705, intended that the decisions by the Administrator of Veterans Affairs should be final.

The benefits provided by this Act are gratuities and the plaintiff is in no better position than one of the *direct* beneficiaries of the provisions of the act.

As a result thereof we feel that the district court was correct in holding that it had no jurisdiction.

Respectfully submitted,

CLARENCE S. BECK,
Attorney General,
ROBERT V. HOAGLAND,
Assistant Attorney General,
Attorneys for Respondents,
Freeman B. Decker,
Wayne O. Reed,
Otto G. Ruff.

PROOF OF SERVICE.

Robert V. Hoagland, being first duly sworn on oath deposes and says that he is one of the duly appointed, qualified and acting Assistant Attorneys General of the State of Nebraska. I hereby certify that I served a copy of the within response and brief on the 18th day of November, 1955, upon all of the parties interested herein, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with Air Mail postage attached prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Honorable Donald R. Ross
United States District Attorney
306 Post Office Building
Omaha, Nebraska.

2. On the plaintiff and Petitioner by mailing a copy thereof to his attorney, Herbert W. Baird in the regular mails with postage prepaid to his office address at 138 North 12th Street, Lincoln 8, Nebraska.

ROBERT V. HOAGLAND,
Assistant Attorney General,
State of Nebraska.

Subscribed and sworn to before me this 18th day of November, 1955.

Notary Public
My Commission Expires July 10, 1959.

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PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI.

The petitioner respectfully submits the Court's decision to deny the writ of certiorari herein prayed was erroneous and improvident. Petitioner hereby makes his petition for writ of certiorari in its entirety a part hereof by reference.

1. The relief sought and denied in the Court of Appeals for the Eighth Circuit was upon the grounds that jurisdiction was vested in the District Court and that the controversy could not be finally decided by

any administrative bureau or agency without impairing petitioner's property and procedural rights.

In *St. Joseph Stock Yard Co.* v. *United States*, 298 U. S. 38, 52 (1936), pertaining to administrative bodies of finality of fact-determination, the Court had the following to say:

> "But to say that findings of fact may be made conclusive where constitutional rights of liberty and property are involved, * * * is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safefuards."

2. The petitioner claimed a vested right in his properties based upon contractual relations and considerations that created a property right protected from being taken without compensation.

In *Lynch* v. *United States*, 292 U. S. 571, Justice Brandeis had the following to say:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obliger be a private individual, a State, or the United States, rights against the United States arising out of a contract with it are protected by the Fifth Amendment. When the United States enters into contract relations, its rights and duties therein are governed generally by law applicable to contracts between private individuals."

3. The Congress cannot by statute invest an administrative body with power to deprive an individual of anything in which his right is otherwise protected by the Fifth and Fourteenth Amendments.

In *Crowell* v. *Benson*, 285 U. S. 22, 56-57 (1932), Chief Justice Hughes elaborated in fusing the due process clause of the Fifth Amendment with Article III:

> "* * * whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency * * * for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." To do so, contended the Chief Justice, "Would be to sap the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system, wherever constitutional rights depend, as not infrequently they do depend, upon the facts, and finality as to the facts becomes in effect finality in law."

4. The Administrator of Veterans Affairs, Washington, D. C. for the purpose of this action was subject to and within the jurisdiction of the District Court for the reason he was functioning there through his agents.

In *Brougham* v. *Blanton Mfg. Co.*, 243 Fed. 503, the court had the following to say:

> "It is first contended by the appellant that no injunction could rightly have been granted against the appellants, because such an injunction could not have been properly granted against the Secretary of Agriculture. In St. Louis Independent Packing Co. v. Hon. David F. Houston, 242 Fed. 337, we recently had occasion to fully examine this question, and following that case we hold that this injunction could properly have been issued against the Secretary of Agriculture, had he been served or appeared, and he not being within the jurisdiction of the court, but having his subordinates there, who, it was alleged, were violating the law

or about to violate it, upon a proper showing an injunction could issue against them."

The most solemn obligation of the Court is to seize and grasp the fundamental fact that one miscarriage of justice is one too many. That our tripartite form of government depend upon the survival of this Nation as a Constitutional Republic founded upon democratic principles, and the failure of the court and its officers in their obligations due the individual in his effort to obtain the full due process of law guaranteed him would be a black mark on the administration of justice.

The petitioner believes this controversy worthy of consideration of the Court for a final and just determination of the cause rather than a summary determination thereof.

Respectfully submitted,

HERBERT W. BAIRD,
138 N. 12th Street,
Lincoln 8, Nebraska,
Attorney for Petitioner.

CERTIFICATE.

Herbert W. Baird, attorney for petitioner, hereby certifies the above is restricted to Rule 58 of the Revised Rules of this Court and is for the purpose of obtaining justice and not for the purpose of delay.

Herbert W. Baird.